



# Guantanamo Detention Center: Legislative Activity in the 111<sup>th</sup> Congress

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November 6, 2009

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R40754

## Summary

The detention of alleged enemy combatants at the U.S. Naval Station in Guantanamo Bay, Cuba, and the potential transfer of such individuals away from the Guantanamo detention facility, have been the focus of significant legislative activity during the 111<sup>th</sup> Congress. Several enacted authorization and appropriations measures affect the treatment of Guantanamo detainees and restrict the use of federal funds to transfer or release Guantanamo detainees into the United States.

Section 14103 of the Supplemental Appropriations Act, 2009 (P.L. 111-32), enacted in June 2009, restricts the use of funds appropriated by that or any prior act for the transfer or release of detainees into the United States. However, for transfers for the purpose of prosecution or legal proceedings, an exception may be made if the President submits a plan fulfilling specified requirements to Congress 45 days prior to the transfer.

Three FY2010 measures enacted to date—the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), and the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88)—generally bar the use of federal funds appropriated in those or “any other” acts to release or transfer a Guantanamo detainee into the United States or specified U.S. territories. Like the 2009 Supplemental Appropriations Act, they provide exceptions in some circumstances for transfers effected after a 45-day reporting requirement has been fulfilled. The exceptions vary somewhat. Most notably, the exception in P.L. 111-84 appears to contemplate transfers to the United States for continued preventative detention, while the other measures restrict transfers to those for prosecution or detention during legal proceedings. The effective time periods for the restrictions also differ. The restriction in the defense authorization measure, P.L. 111-84, applies through December 31, 2010. In contrast, the restrictions in P.L. 111-83 and P.L. 111-88 presumably apply commensurately with the 2010 fiscal year (October 1, 2009, to September 30, 2010).

The public laws and pending proposals address additional issues related to the treatment and disposition of Guantanamo detainees. Title XVIII of P.L. 111-84 establishes new procedures for military commissions. Section 552 of P.L. 111-83 requires that former Guantanamo detainees be included on the “No Fly List” in most circumstances and restricts their access to immigration benefits.

This report analyzes relevant provisions in enacted legislation and selected pending bills. For more detailed explorations of the legal issues related to the potential closure of the detention facility and the transfer, release, and treatment of detainees, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al., and CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea, Kenneth R. Thomas, and Michael John Garcia.

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## Introduction

In 2001, Congress authorized the President's use of "all necessary and appropriate force" against those responsible for the 9/11 terrorist attacks.<sup>1</sup> Pursuant to that authority, the United States has captured suspected Al Qaeda and Taliban members and detained them at several locations, including the U.S. Naval Station at Guantanamo Bay, Cuba. Of the nearly 800 alleged enemy combatants whom the United States has detained at Guantanamo throughout the course of post-9/11 military operations, all but 215 detainees have been released or transferred from the base. For the remaining Guantanamo detainees, practical and legal hurdles, including national security concerns and questions regarding detainees' rights under international law and the U.S. Constitution, have delayed prosecutions and made transfers difficult.<sup>2</sup> In some cases, such as with detainees who are ethnic Uighurs, a Turkic Muslim minority group from China, challenges have arisen because transfer to a detainee's country of origin might raise national security or human rights concerns but other countries have been unreceptive to accepting detainees.<sup>3</sup>

Highlighting the prominence of the issue, three executive orders signed by President Obama shortly after he took office affect the Guantanamo detention facility or Guantanamo detainees. To "promptly" close the detention facility and "in order to effect the appropriate disposition of" Guantanamo detainees, one executive order required the closure of the detention facility as soon as practicable, and no later than January 22, 2010.<sup>4</sup> It also ordered an immediate review of each detainee's status and temporarily halted all proceedings before military commissions.<sup>5</sup> Two additional executive orders addressed overall wartime detention policy. One limited the methods for interrogating persons in U.S. custody (as part of any armed conflict) to those listed in the Army Field Manual on Human Intelligence Collector Operations, although it provides an exception for interrogations by the Federal Bureau of Investigation, stating that the FBI may "continu[e] to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises."<sup>6</sup> A third executive

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<sup>1</sup> Authorization to Use Military Force, P.L. 107-40 (2001). The authority applies to "nations, organizations, or persons" who "planned, authorized, committed, or aided the terrorist attacks" and to people who harbored the perpetrators of the attacks.

<sup>2</sup> For more detailed background information and an analysis of legal issues implicated by the potential closure of Guantanamo, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

<sup>3</sup> Emphasizing likely human rights abuses the Uighur detainees would likely suffer if returned to their native China, a U.S. district court judge ordered them released into the United States, but the order was stayed and reversed by the U.S. Court of Appeals for the District of Columbia Circuit. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 78 U.S.L.W. 3237 (2009). The Pacific nation of Palau has accepted some but not all of the Uighur detainees.

<sup>4</sup> Executive Order 13492, Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897–4900 (Jan. 27, 2009).

<sup>5</sup> *Id.* Congress enacted the Military Commissions Act of 2006, P.L. 109-366, to authorize the President to convene military commissions to prosecute "alien unlawful enemy combatants." The act exempted the new military commissions from several requirements, codified in the Uniform Code of Military Justice, that would have otherwise applied. For a detailed analysis of the military commissions created pursuant to the Military Commissions Act, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea. In May 2009, the Secretary of the Department of Defense notified Congress of five proposed modifications to the procedures for the military commissions established under the Military Commissions Act. See White House Press Release, *Statement of President Barack Obama on Military Commissions* (May 15, 2009). The Military Commissions Act of 2009, Title XVIII of P.L. 111-84 (discussed *infra*) enacts further revisions.

<sup>6</sup> Executive Order 13491, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4891–4896 (Jan. 27, 2009); Army Field (continued...)

order established the Special Task Force on Detainee Disposition, tasked with “identif[ying] lawful options” for the disposition of Guantanamo detainees and others captured by the United States.<sup>7</sup> Because executive orders can be revoked by subsequent presidential directives, legislation would be necessary to make the President’s policies permanent. Likewise, Congress may reverse or adjust the approach of the executive orders in any area in which it has the authority to act.

Key issues implicated by the potential closure of the detention facility include the transfer or release of detainees and procedures for prosecuting them or assessing their enemy belligerency status. Members have noted that issues related to the disposition of the remaining detainees complicate any legislative actions to fund, mandate, or prohibit closure of the detention facility. For example, when introducing a bill proposing a timeline for closure of the facility, Senator Feinstein noted that “the hard part about closing Guantanamo is not deciding to go do it; it is figuring out what to do with the remaining detainees.”<sup>8</sup> Thus, much of the legislative activity related to Guantanamo has focused on the transfer, release, and treatment of detainees.

To date in the 111<sup>th</sup> Congress, relevant provisions have been enacted as part of the 2009 Supplemental Appropriations Act (P.L. 111-32), the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), the 2010 National Defense Authorization Act (P.L. 111-84) and the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88). Although their particular requirements vary, all three acts prohibit or place conditions on the use of federal funds to release or transfer Guantanamo detainees into the United States. Such measures are perhaps prompted by perceived security risks to U.S. citizens that some argue could arise if suspected terrorists were detained or tried in the United States.<sup>9</sup> House and Senate-passed versions of another appropriations measure, the Department of Defense Appropriations Act, 2010 (H.R. 3326), would likewise restrict the use of funds to effectuate the release or transfer of Guantanamo detainees into the United States. The inclusion of these similar restrictions in multiple 2010 appropriations measures indicates the strength of congressional interest in the issue. The seemingly overlapping provisions might serve additional purposes, such as to ensure the application of the restrictions to all relevant funds appropriated during the 2010 fiscal year, and perhaps to ensure that reports required by the provisions are submitted to committees with subject matter jurisdiction related to the funds in question.<sup>10</sup>

The new laws effect relevant changes other than the restrictions on the use of funds for transfer and release. A few provisions are specific to the treatment of Guantanamo detainees. Others apply

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(...continued)

Manual, § FM 2-22.3, Human Intelligence Collector Operations, issued by the Department of the Army on September 6, 2006.

<sup>7</sup> Executive Order 13493, *Review of Detention Policy Options*, 74 Fed. Reg. 4901–4902 (Jan. 27, 2009).

<sup>8</sup> 155 Cong. Rec. S157 (daily ed. Jan. 7, 2009) (statement of Sen. Feinstein).

<sup>9</sup> See, e.g., Press release, Rep. J. Randy Forbes, *Members Introduce Bill to Prevent Transfer of Terrorists to Virginia Prisons* (Mar. 2, 2009), available at <http://forbes.house.gov/News/DocumentSingle.aspx?DocumentID=113008>.

<sup>10</sup> Legislative history indicates an understanding on the part of some Members that restrictions on funding in the FY2010 acts were intended to enhance the restrictions enacted in the Supplemental Appropriations Act, 2009 (P.L. 111-32). See, e.g., 155 Cong. Rec. S10555 (daily ed. Oct. 20, 2009) (statement of Sen. McCain) (“By extending [the] prohibition to U.S. territories and possessions, the conference report further restricts the release of detainees enacted into law in the supplemental appropriations act for fiscal year 2009.”). However, the legislative history does not provide a clear indication of Congress’s intention regarding the multiple provisions in the various 2010 appropriations acts.

to wartime detentions at Guantanamo and elsewhere. This report surveys the provisions of enacted laws and pending legislative proposals that are relevant to detentions at Guantanamo.

## Enacted Laws

As mentioned, four measures with provisions relevant to Guantanamo detainees have been enacted to date during the 111<sup>th</sup> Congress. They include: the 2009 Supplemental Appropriations Act (P.L. 111-32), the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), the 2010 National Defense Authorization Act (P.L. 111-84), and the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88).

Among other things, all of the statutes restrict the use of federal funds to transfer or release Guantanamo detainees into the United States. However, the restrictions have varying scope and are effective for different time frames. The restriction in P.L. 111-32, the 2009 supplemental act, does not apply to funds appropriated in the subsequent acts. The restriction in P.L. 111-84, the FY2010 defense authorization measure, applies through December 31, 2010. In contrast, such restrictions in the 2010 homeland security and interior department appropriations acts (P.L. 111-83, P.L. 111-88) appear to apply only to funds appropriated for FY2010 (October 1, 2009, to September 30, 2010).<sup>11</sup>

As mentioned, provisions in the FY2010 acts which limit the use of federal funds are similar but not identical. It is likely that the acts will be interpreted to avoid a conflict between the various related provisions.<sup>12</sup> For example, the measures differ regarding the extent to which they provide for transfers to the United States for continued preventative detention rather than only for prosecution or detention during legal proceedings. During time frames for which multiple provisions are in effect, the most restrictive provision is likely to be controlling. Likewise, the measures direct the President to provide different information in reports required before a detainee may be transferred. To the extent that differing reporting requirements would be made to the same committee, presumably the requirements will be read as having a cumulative effect.

After the 2009 Supplemental Appropriations Act became law, the President assigned respective reporting functions required by that act to the Attorney General, Director of National Intelligence, and Secretary of State.<sup>13</sup> It is likely that authorities for the reporting requirements in the FY2010 acts will be delineated similarly.

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<sup>11</sup> In appropriations acts, the phrase “or any other act” is typically interpreted as applying to any appropriation for the same fiscal year as the act in question. *See Williams v. United States*, 240 F.3d 1019, 1063 (Fed. Cir. 2001) (“[T]he words ‘or by any other Act’ ... are not words of futurity; they merely refer to any other appropriations act for the same fiscal year.”) (citations omitted). As discussed *infra*, the relevant provisions in the 2010 appropriations measures enacted to date restrict the use of funds appropriated by those “or any other act[s].” Thus, the restrictions appear to apply to any funds appropriated for FY2010, but they would not apply to funds appropriated in future fiscal years.

<sup>12</sup> Whenever possible, courts interpret two potentially conflicting provisions so as to give effect to both provisions, rather than interpret one as impliedly repealing the other. This rule is especially compelling here, where the potentially conflicting statutes were enacted during the same session or, in the case of the homeland security and defense authorization bills, on the same day. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Pullen v. Morgenthau*, 73 F.2d 281 (2d Cir. 1934). For more information regarding statutory interpretation principles, see CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig and Yule Kim.

<sup>13</sup> *Memorandum of July 17, 2009: Assignment of Reporting Functions Under the Supplemental Appropriations Act*, 2009, 74 Fed. Reg. 35765 (Jul. 21, 2009).

In addition to restrictions on the use of funds to effectuate detainees' transfer or release, some of the enacted statutes contain other, unique provisions relevant to Guantanamo detainees. As discussed below, P.L. 111-32 creates an ongoing reporting requirement on the "prisoner population" and conditions the ceasing of operations at the detention facility upon Congress's receipt of a separate report. P.L. 111-83 prohibits granting immigration benefits to former detainees and mandates their inclusion on the U.S. Department of Homeland Security's "No Fly List." Finally, P.L. 111-84 establishes new procedures governing military commissions and interrogations.

## **Supplemental Appropriations Act, 2009 (P.L. 111-32)**

The Supplemental Appropriations Act, 2009 (P.L. 111-32), signed into law in June 2009, contains two affirmative requirements or restrictions related to the Guantanamo detention facility and a number of related provisions restricting the use of funds appropriated by that or any prior act. Section 319 of the act creates a general reporting requirement, which requires the President to submit reports on the Guantanamo "prisoner population" to specified Members<sup>14</sup> of Congress within 60 days of the legislation's enactment and every 90 days thereafter. The reports must provide the following information with respect to each detainee: (1) name and country of origin; (2) a "summary of the evidence, intelligence, and information used to justify" his detention; and (3) a "current accounting of all the measures taken to transfer" him to his home or another country. In addition, the reports must state the "number of individuals released or transferred from detention ... who are confirmed or suspected of returning to terrorist activities after release or transfer" and provide "an assessment of any efforts by al Qaeda to recruit detainees released from detention." The initial report (which was to be completed within 60 days of the legislation's enactment) was required to address several additional matters, including: (1) a "description of the process that was previously used for screening the detainees" who have been released and are confirmed or suspected of returning to terrorist activities; (2) "[a]n assessment of the adequacy of that screening process for reducing the risk that detainees previously released or transferred ... would return to terrorist activities after [their] release or transfer"; and (3) "[a]n assessment of lessons learned from previous releases and transfers of individuals who returned to terrorist activities for reducing the risk that detainees released or transferred ... will return to terrorist activities after their release or transfer."<sup>15</sup>

Section 14103 prohibits the ceasing of operations at the Guantanamo detention center until a report on the status of detainees has been submitted to Congress. Specifically, it requires the President, before "the termination of detention operations" at the detention facility, to submit a classified report to Congress which "describ[es] the disposition or legal status of each individual

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<sup>14</sup> Members to whom the report must be submitted include:

(1) The majority leader and minority leader of the Senate; (2) The Chairman and Ranking Member on the Committee on Armed Services of the Senate; (3) The Chairman and Vice Chairman of the Select Committee on Intelligence of the Senate; (4) The Chairman and Vice Chairman of the Committee on Appropriations of the Senate; (5) The Speaker of the House of Representatives; (6) The minority leader of the House of Representatives; (7) The Chairman and Ranking Member on the Committee on Armed Services of the House of Representatives; (8) The Chairman and Vice Chairman of the Permanent Select Committee on Intelligence of the House of Representatives; and (9) The Chairman and Ranking Member of the Committee on Appropriations of the House of Representatives.

<sup>15</sup> P.L. 111-32, § 319 (2009).



detained at the facility.”<sup>16</sup> It does not specify the level of detail that the report would need to include with respect to each detainee, nor does it appear to impose any particular time line governing submission of the report.

In addition, § 14103 contains various provisions which restrict the use of funds appropriated by the Supplemental Appropriations Act or any prior act for the transfer or release of Guantanamo detainees. First, it bans the use of such funds for the purpose of releasing any individual detained at Guantanamo into the continental United States, Hawaii, or Alaska. The provision did not appear to restrict the use of funds for the release of detainees to the U.S. territories, though such restrictions were imposed by subsequent enactments, discussed *infra*.

Second, it bars the use of such funds for the purpose of transferring a detainee into the continental United States, Hawaii, or Alaska for continued detention or prosecution. However, it provides an exception for transfers for the purpose of prosecution or legal proceedings, if the President submits a plan to Congress 45 days prior to the transfer, in classified form, concerning the proposed disposition of the individual to be transferred. In particular, the plan must address: (1) “findings of an analysis regarding any risk to the national security of the United States that is posed by the transfer”; (2) “costs associated with transferring the individual”; (3) “[t]he legal rationale and associated court demands for transfer”; (4) “[a] plan for mitigation of any risk”; and (5) “[a] copy of a notification to the Governor of the State to which the individual will be transferred or to the Mayor of the District of Columbia if the individual will be transferred to the District of Columbia with a certification by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.”<sup>17</sup>

Finally, the act creates a similar condition regarding the use of funds for the transfer or release of a detainee to another country. In particular, it limits the availability of funds for the transfer or release of a Guantanamo detainee to a foreign State, unless the President submits a classified report to Congress, at least 15 days prior to the transfer, which contains specified information regarding the proposed transfer. Specifically, the report must provide information regarding: (1) the detainee’s name and the country to which he will be released or transferred; (2) “[a]n assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk”; and (3) “[t]he terms of any agreement with another country for acceptance of such individual, including the amount of any financial assistance related to such agreement.”<sup>18</sup>

## **National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84)**

The 2010 National Defense Authorization Act, P.L. 111-84, contains several provisions relevant to Guantanamo detainees. Section 1041 addresses the release and transfer of detainees to the United States or its territories. Regarding release, section 1041 prohibits the Department of Defense from using funds authorized to be appropriated to it by that act (or otherwise available to

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<sup>16</sup> *Id.* at § 14103(f).

<sup>17</sup> *Id.* at § 14103(d).

<sup>18</sup> *Id.* at § 14103(e).



the Department) to release a Guantanamo detainee into the United States or its territories during the period beginning October 1, 2009, and ending December 31, 2010.

Regarding transfer, section 1041 requires the President to submit a plan to the congressional defense committees at least 45 days before transferring any Guantanamo detainee anywhere within the United States, its territories or possessions. The plan must include: (1) “an assessment of the risk that the [detainee] poses to the national security of the United States, its territories, or possessions”; (2) a proposal for the disposition of each detainee; (3) a plan to mitigate any identified risks; (4) the proposed transfer location; (5) information regarding costs associated with the transfer; (6) a “summary” of the consultation required to take place with the local jurisdiction’s chief executive; and (7) “a certification by the Attorney General that under the plan the individual poses little or no security risk to the United States, its territories, or possessions.” The section includes a corresponding consultation requirement, requiring that the President “consult with the chief executive” of the jurisdiction that is a proposed location of transfer. The requirement appears to contemplate a somewhat greater degree of involvement by state governors than the Supplemental Appropriations Act, which requires a certification that a governor has been “notified” regarding a transfer, but the section does not go so far as to require the governors’ consent before transfers may occur.

Other sections of the bill apply to Defense Department operations or detainee treatment generally, but would likely have significant implications for persons held at Guantanamo. First, Title XVIII, the Military Commissions Act of 2009, establishes new procedures governing military commissions.<sup>19</sup> Examples of changes enacted in the measure include a prohibition on the use of evidence elicited by cruel or degrading treatment, without regard to when the statement was made; a shift to the government of the burden of proof for the reliability of hearsay evidence; an extension of the obligation to disclose exculpatory information to include evidence of mitigating circumstances; a new requirement that limits military commissions’ jurisdiction to offenses which occurred “in the context of and associated with armed conflict”; and a detailed set of procedures regarding the use of classified evidence. Although proposals had been introduced earlier in the 111<sup>th</sup> Congress that would have abolished military commissions altogether,<sup>20</sup> Congress has instead opted to pass legislation which preserves the military commission system while amending the statutory framework.

In addition, section 1040 restricts the reading of the warnings required in the domestic criminal law enforcement context by the Supreme Court decision in *Miranda v. Arizona*.<sup>21</sup> Applying

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<sup>19</sup> Presumably, one motivation for the new procedures is judicial opinions invalidating provisions of the Military Commissions Act of 2006. See *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S.Ct. 2229 (2008) (invalidating the provision in the act that purported to foreclose *habeas corpus* challenges brought by Guantanamo detainees). For more information regarding the military commissions, see CRS Report R40752, *The Military Commissions Act of 2006 (MCA): Background and Proposed Amendments*, by Jennifer K. Elsea.

<sup>20</sup> For example, the Interrogation and Detention Reform Act of 2008, H.R. 591, referring to the “failure of the military commissions system,” would abolish the military commission system. Instead, prosecutions would take place in federal civilian courts or in military court proceedings.

<sup>21</sup> The section would also require the Secretary of Defense to submit a report within 90 days of the act’s enactment. The report would assess how the reading of *Miranda* rights to individuals taken into custody in Afghanistan “may affect: (1) the rules of engagement of the Armed Forces deployed in support of Operation Enduring Freedom; (2) post-capture interrogations and intelligence-gathering activities conducted as part of Operation Enduring Freedom; (3) the overall counterinsurgency strategy and objectives of the United States for Operation Enduring Freedom; (4) United States military operations and objectives in Afghanistan; and (5) potential risks to members of the Armed Forces operating in Afghanistan.”

*Miranda*,<sup>22</sup> courts generally do not admit defendants' statements at trial unless law enforcement officers first advise them, with the warnings beginning with "You have the right to remain silent," of their Fifth Amendment right against self-incrimination.<sup>23</sup> Section 1040 prohibits the reading of *Miranda* warnings, absent a court order requiring that such warnings be read, to any "foreign national who is captured or detained as an enemy combatant by the United States."<sup>24</sup> Thus, it applies to all foreign nationals detained as enemy belligerents (presumably including prisoners of war), rather than just foreign nationals detained at Guantanamo.<sup>25</sup> However, the section does not prohibit warnings made by the Department of Justice.

Finally, section 1080 requires, among other things, that the Department of Defense "ensure that each strategic intelligence interrogation of any person who is in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility is videotaped or otherwise electronically recorded."

## Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83)

P.L. 111-83, the Department of Homeland Security Appropriations Act, 2010, was signed into law the same day as the defense authorization measure. Section 552 generally prohibits the use of funds appropriated by that or any other act to effectuate the release or transfer of a Guantanamo detainee into the United States or specified U.S. territories. Unlike P.L. 111-84, which applies the restriction to all U.S. "territories or possessions," P.L. 111-83 enumerates specific territories for which the restriction applies, namely Guam, American Samoa, the United States Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands. It does not appear to apply to other U.S. territories or possessions.<sup>26</sup>

Section 552 provides an exception for transfers made for the purpose of prosecution or for detention during legal proceedings. Like the Defense Authorization Act, it requires that a plan be submitted to Congress 45 days prior to any such transfer. In addition to the components of the plan required by the defense measure, § 552 requires that the plan include: (1) "a determination of

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<sup>22</sup> 384 U.S. 436 (1966).

<sup>23</sup> Fifth Amendment protections concerning the right against self-incrimination and due process serve as dual bases for exclusion of evidence perceived to be coercive. U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"). Interrogations are generally presumed to be coercive unless *Miranda* warnings have been given or an exception to the *Miranda* requirement applies.

<sup>24</sup> Section 504 of the version of the Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, reported in the House, contains a similar prohibition. In addition, § 744 of the Financial Services and General Government Appropriations Act, 2010, H.R. 3170, "requests the President, and directs the Attorney General, to transmit to each House of Congress ... copies of any portions of all documents, records, and communications in their possession referring or relating to the notification of rights under [*Miranda*] ... to ... detainees in the custody of the Armed Forces of the United States."

<sup>25</sup> It is unclear how, if at all, this provision will affect the warning requirement in Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831, which prohibits military personnel from interrogating an accused or suspected person, arguably including a person captured during hostilities, without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense ... ". A narrow reading of section 1040 might not encompass the Article 31 warnings because they technically differ from the warnings required by *Miranda*.

<sup>26</sup> U.S. possessions not enumerated in the act include, for example, Baker Island and other island possessions.

the risk that a detainee might instigate an act of terrorism within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States Territories” and (2) “a determination of the risk that the individual might advocate, coerce, or incite violent extremism, ideologically motivated criminal activity, or acts of terrorism, among inmate populations at incarceration facilities within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States Territories.” Another difference is that the act requires a copy of a “notification” to the executive of the jurisdiction where transfer will occur be sent “14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States,” rather than a certification of a “consultation,” as the defense measure effectively requires.

In addition, § 552 restricts the use of appropriated funds to transfer or release a Guantanamo detainee to another country or any “freely associated state,”<sup>27</sup> unless the President, 15 days prior to such transfer or release, submits the following information in classified form: (1) the name of the detainee and the country or freely associated state to which he will be transferred; (2) an assessment of the risk to national security or U.S. citizens posed by the transfer or release; and (3) the terms of any agreement with the country or freely associated state that has agreed to accept the detainee.

Section 552 includes two additional provisions affecting the treatment of Guantanamo detainees, both of which would apply permanently—i.e., beyond when the appropriations measure is in effect. One provision amends 49 U.S.C. § 44903(j)(2)(C) to require that former detainees be included on the “No Fly List,” “unless the President certifies in writing to Congress that the detainee poses no threat to the United States, its citizens, or its allies.” A second provision prohibits the use of funds appropriated under the act to “provide any immigration benefit” to any former Guantanamo detainee, including a visa, admission into the United States, parole into the United States, or classification as a refugee or applicant for asylum. Both provisions are similar to proposals introduced earlier during the 111<sup>th</sup> Congress.<sup>28</sup>

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<sup>27</sup> The act includes the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau within its definition of “freely associated states.”

<sup>28</sup> Two bills introduced earlier in the House would have required that Guantanamo detainees’ names be added to the Transportation Security Administration’s “No Fly List.” See A bill to amend title 49, United States Code, to require inclusion on the no fly list certain detainees housed at the Naval Air Station, Guantanamo Bay, Cuba, H.R. 2503, 111<sup>th</sup> Cong. (2009); Transportation Security Administration Authorization Act, H.R. 2200, 111<sup>th</sup> Cong. (2009) at § 405(a).

Regarding immigration benefits, H.R. 1238 would make an alien detained at Guantanamo “permanently ineligible” for both “admission to the United States for any purpose” and “parole into the United States or any other physical presence in the United States that is not regarded as an admission.” Likewise, S. 1071, the Protecting America’s Communities Act, would amend the Immigration and Nationality Act to prohibit the admission, asylum entry, or parole entry of a Guantanamo detainee into the United States. It would also require that a Guantanamo detainee be detained for an additional six months after the “removal period” if the Secretary of Homeland Security certifies that: (1) the detainee “cannot be removed due to the refusal of all countries designated by the [detainee] or under this section to receive the [detainee]”; and (2) “the Secretary is making reasonable efforts to find alternative means for removing the [detainee].” Similarly, the Protection from Enemy Combatants Act, S. 108, would forbid the release by a U.S. court of any “covered alien”—defined as any person who “was detained” at Guantanamo—into the United States. Protection from Enemy Combatants Act, S. 108, 111<sup>th</sup> Cong. (2009). It would also bar the issuance of an immigration visa or the granting of any immigration status that might facilitate a detainee’s entry into the United States or continued presence after release from custody. However, S. 108 contains a waiver provision that would allow the President to remove the restriction where doing so would be “consistent with the national security of the United States.” S. 1081, introduced by Senator Graham, includes measures similar to those in H.R. 1238 and S. 108, but it would apply only to non-U.S. citizens who had been determined by a Combatant Status Review Tribunal to be enemy combatants. A bill to prohibit the release of enemy combatants into the United States, S. 1081, 111<sup>th</sup> Cong. (2009).

## **Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88)**

Like the other FY2010 acts, P.L. 111-88, the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, would generally restrict the use of funds appropriated by that or “any other act” for the release or transfer of Guantanamo detainees. However, it contains an exception identical to the exception in P.L. 111-83 for transfers for the purpose of prosecution or detention during legal proceedings. Specifically, section 428 provides an exception for such transfers to “any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI)” 45 days after the submission of a plan, to include the same components as are required by P.L. 111-83. It likewise contains restrictions identical to those in P.L. 111-83 concerning transfer or release to other countries or “freely associated states.”

## **Pending Legislative Proposals**

Numerous legislative proposals introduced during the 111<sup>th</sup> Congress address the disposition or treatment of Guantanamo detainees. Some bills introduced shortly after the issuance of the three relevant executive orders in January 2009 suggest specific time frames for closure of the Guantanamo detention facility.<sup>29</sup> In introductory remarks regarding one such bill, Representative Harman said that closure was necessary because the detention facility is “so widely viewed as illegitimate, so plainly inconsistent with America’s proud legal traditions, that it has become a stinging symbol of our tarnished standing abroad.”<sup>30</sup>

However, as shown, recent legislative activity related to Guantanamo detentions has favored restrictions on the use of appropriated funds to effectuate Guantanamo detainees’ transfer or release, perhaps signaling an approach by Congress to delay closure at least until more information has been received. In the case of additional FY2010 authorization or appropriation measures still pending, House versions now under consideration include restrictions on the release or transfer of detainees which Senate versions do not.<sup>31</sup>

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<sup>29</sup> By requiring closure of the base within 180 days of enactment, the Interrogation and Detention Reform Act of 2008, H.R. 591, proposed the shortest time frame. The Terrorist Detainees Procedures Act of 2009, H.R. 1315, provided a target date of December 31, 2009, which is slightly sooner than the date set by the President’s executive order. Two companion bills, S. 147 and H.R. 374, would require closure within one year. The companion bills’ time line corresponds with the one-year timetable set in President Obama’s executive order, although the one-year mark set by the bills would track the date of the legislation’s enactment. All of these bills also provided corresponding options and restrictions governing the transfer and prosecution of detainees.

<sup>30</sup> 155 Cong. Rec. E59 (daily ed. Jan. 9, 2009) (extended remarks of Rep. Harman).

<sup>31</sup> For example, the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010, H.R. 3081, which has been passed by the House and placed on the Senate calendar, contains a five-day notification requirement for transfers to other countries. Specifically, § 7087 restricts the obligation of funds “for any country ... that concludes an agreement with the United States to receive [Guantanamo detainees] by transfer or release ... unless, not later than 5 days after the conclusion of the agreement but prior to implementation of the agreement, the Secretary of State notifies the Committees on Appropriations in writing of the terms of the agreement.” The corresponding Senate bill, S. 1434, does not address Guantanamo detainees.

## **Department of Defense Appropriations Act, 2010 (H.R. 3326)**

Differences between the House and Senate versions of the Department of Defense Appropriations Act, 2010, H.R. 3326, are being resolved by conference committee. Provisions restricting the transfer and release of Guantanamo detainees differ substantially in the two versions.

Section 8119 of the House version restricts the transfer and release of Guantanamo detainees in a manner very similar to the restrictions in the enacted laws discussed above. It would prohibit the use of funds appropriated by that or any prior act to release any Guantanamo detainee into the United States or the same territories enumerated in P.L. 111-83 and P.L. 111-88—namely Guam, American Samoa, the United States Virgin Islands, the commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands. The reporting requirement upon which transfers to the United States would be conditioned contains elements nearly identical to those that would be included in a report submitted prior to transfer pursuant to § 14103 of the Supplemental Appropriations Act or § 1041 of the 2010 National Defense Authorization Act, P.L. 111-84. Namely, § 8119 would require the President to submit a “comprehensive plan regarding the proposed disposition” of each detainee except those whom the President proposes to transfer or release to another country. The plan must include, “at a minimum”: (1) “findings of an analysis regarding any risk to the national security of the United States that is posed by the transfer of the individual”; (2) “costs associated with not transferring the individual”; (3) “[t]he legal rationale and associated court demands for transfer”; (4) a “certification by the President that any risk ... has been mitigated, together with a full description of the plan for such mitigation”; and (5) a “certification by the President that the President has submitted to the Governor and legislature of the State or territory ... a certification in writing at least 30 days prior to such transfer ... that the individual does not pose a security risk to the United States.” A notable distinction between this act and others is that it appears to permit transfers for the purpose of continued preventative detention, in contrast to other measures which permit transfers only for purposes of prosecution or detention during legal proceedings.

In contrast, § 9010 of the Senate version would establish a strict prohibition, without exceptions, on the transfer or release of Guantanamo detainees into the United States. In particular, the section states that: “[n]one of the funds appropriated or otherwise made available by this Act or any prior Act may be used to transfer, release, or incarcerate any individual who was detained as of October 1, 2009, at Naval Station, Guantanamo Bay, Cuba, to or within the United States or its territories.” In other words, the Senate version does not include any exception authorizing transfers to the United States. However, unlike some of the FY2010 measures already enacted, the prohibition would apply to funds appropriated by that or “any prior act,” not “any other act.” Thus, it appears that a subsequent appropriation would be sufficient to remove the blanket prohibition imposed by the Senate version, whereas provisions enacted in P.L. 111-83 and P.L. 111-88 appear to apply for the duration of the 2010 fiscal year.

## **Selected Additional Bills**

Numerous approaches to the disposition and treatment of Guantanamo detainees were proposed shortly before or after the President issued the three executive orders in January 2009, or were introduced in response to subsequent debates regarding the initial proposals. Many of the early bills are reflected in the enacted public laws. For example, enacted provisions mirror bills which



were introduced to prohibit the transfer of detainees, replace the military commissions framework, or restrict Guantanamo detainees' access to immigration benefits.<sup>32</sup>

Additional proposals introduced during the 111<sup>th</sup> Congress raise issues not addressed in the enacted or pending authorization and appropriations measures. Such proposals might become relevant as closure of the Guantanamo detention facility appears more imminent or as Congress reviews the United States' overall wartime detention policies.

## Detainee Treatment

Several pending bills address the treatment of persons detained at the Guantanamo detention facility or elsewhere. Companion bills (S. 147 and H.R. 374), both entitled the Lawful Interrogation and Detention Act, propose that interrogations of all persons in custody of U.S. intelligence agencies be conducted in accordance with the U.S. Army Field Manual.<sup>33</sup> Such legislation would foreclose the possibility, left open in President Obama's executive order on interrogation, that techniques other than those in the Army Field Manual could eventually be deemed appropriate for use by agencies outside the military.<sup>34</sup>

A few bills would restrict detainees' access to public benefits or medical facilities. H.R. 2338 would make those detained at Guantanamo as of the bill's enactment and subsequently transferred to the United States "permanently ineligible" for specified federal, state, or local benefits.<sup>35</sup> Another bill, H.R. 1042, prohibits the provision of medical treatment to Guantanamo detainees in any facility where members of the armed forces also receive treatment or in any facility operated by the Department of Veteran's Affairs.<sup>36</sup> To the extent that H.R. 1042 would result in withholding medical care, it is possible that it would raise legal concerns regarding U.S. compliance with international treaty obligations. Treatment of wartime detainees in the conflict with Al Qaeda and the Taliban is primarily governed by the Detainee Treatment Act of 2005 and Common Article 3 of the Geneva Conventions.<sup>37</sup> Pursuant to the Detainee Treatment Act of 2005, all persons in the custody or control of the U.S. military (including Guantanamo detainees) must be treated in accordance with Army Field Manual requirements.<sup>38</sup> Under Common Article 3,

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<sup>32</sup> For example, H.R. 148, H.R. 565, H.R. 633, H.R. 701, H.R. 794, H.R. 817, H.R. 829, H.R. 951, H.R. 1073, H.R. 1186, H.R. 1566, and H.R. 2315 proposed prohibitions on the use of federal funds for transferring Guantanamo detainees to particular locations within the United States. Like the 2010 defense authorization act (P.L. 111-84), H.R. 1315, the Terrorist Detainees Procedures Act of 2009, would have repealed the Military Commissions Act of 2006. It would also have established new procedures for hearings by combatant status review tribunals. And similar to the approach in the 2010 homeland security appropriations act (P.L. 111-83), H.R. 1238 would have made an alien detained at Guantanamo "permanently ineligible" for both "admission to the United States for any purpose" and "parole into the United States or any other physical presence in the United States that is not regarded as an admission."

<sup>33</sup> Lawful Interrogation and Detention Act, H.R. 374, 111<sup>th</sup> Cong.; Lawful Interrogation and Detention Act, S. 147, 111<sup>th</sup> Cong.

<sup>34</sup> Executive Order, Ensuring Lawful Interrogations, January 22, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/).

<sup>35</sup> No Welfare for Terrorists Act of 2009, H.R. 2338, 111<sup>th</sup> Cong. (2009). The provision would presumably apply even if a court determined a detainee to have been wrongfully held.

<sup>36</sup> To prohibit the provision of medical treatment to enemy combatants detained by the United States at Naval Station, Guantanamo Bay, Cuba, in the same facility as a member of the Armed Forces or Department of Veterans Affairs medical facility, H.R. 1042, 111<sup>th</sup> Cong. (2009).

<sup>37</sup> The U.S. Supreme Court determined that, at a minimum, Common Article 3 applies to persons captured in the conflict with Al Qaeda in a 2006 case, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>38</sup> Section 1002 of P.L. 109-148 requires the DOD to follow the Army Field Manual for intelligence interrogation. See (continued...)



detainees must be treated humanely and protected from “violence to life and person,” “cruel treatment and torture,” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”<sup>39</sup>

## Executive and Judicial Authorities

Several other bills introduced during the 111<sup>th</sup> Congress address broad issues related to executive authority to detain enemy belligerents or judicial authority to review *habeas corpus* petitions. For example, the Protecting America’s Communities Act, S. 1071, would “reaffirm” the President’s authority to “detain enemy combatants in connection with the continuing armed conflict with al Qaeda, the Taliban, and associated forces ... regardless of the place of capture.”<sup>40</sup> Similarly, the Enemy Combatant Detention Review Act of 2009, H.R. 630, “reaffirms that the President is authorized to detain enemy combatants in connection with the continuing armed conflict with al Qaeda, the Taliban, and associated forces, regardless of the place of capture, until the termination of hostilities.”<sup>41</sup> These provisions would perhaps extend the President’s authority to preventively detain enemy belligerents as part of post-9/11 military operations. In *Hamdi v. Rumsfeld*, the Supreme Court held that the 2001 Authorization to Use Military Force authorized the President to preventively detain enemy combatants captured during hostilities in Afghanistan but did not address whether such authority extends to captures made in other locations.<sup>42</sup> With the language “regardless of place of capture,” S. 1071 and H.R. 630 appear to authorize preventative detentions of any alleged Al Qaeda or Taliban belligerent, even if captured outside military operations in Afghanistan.

H.R. 630 would also amend the federal *habeas corpus* statute.<sup>43</sup> For example, it would: (1) grant exclusive jurisdiction over *habeas* challenges to the U.S. District Court in the District of Columbia; (2) establish a rebuttable presumption that detainees are enemy combatants for the purpose of *habeas* review; and (3) require that *habeas* proceedings be stayed after charges are brought under the Military Commissions Act and until a detainee has exhausted review procedures established by that act. Because it stays *habeas* review only for detainees against whom charges have been brought, this proposal differs from the broader denial of *habeas* review which the Supreme Court struck down as constitutionally invalid in *Boumediene v. Bush*.<sup>44</sup> It is unclear whether this distinction would be sufficient to withstand judicial scrutiny.

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(...continued)

Department of the Army Field Manual 2-22.3 (FM 34-52), Human Intelligence Collector Operations (2006).

<sup>39</sup> “Common Article 3” refers to the third article in each of the four Geneva Conventions, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114); the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217); the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

<sup>40</sup> Protecting America’s Communities Act, S. 1071, 111<sup>th</sup> Cong. (2009).

<sup>41</sup> Enemy Combatant Detention Review Act of 2009, H.R. 630, 111<sup>th</sup> Cong. (2009).

<sup>42</sup> 542 U.S. 507 (2004).

<sup>43</sup> 28 U.S.C. §2241.

<sup>44</sup> 553 U.S. \_\_\_, 128 S.Ct. 2229 (2008) (holding that the constitutional privilege of *habeas corpus* applies to Guantanamo detainees and that provisions in the Military Commissions Act do not provide an adequate substitute for *habeas* claims). For more information on the *Boumediene* decision, see CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees’ Right to Habeas Corpus*, by Michael John Garcia.

The Terrorist Detainees Procedures Act of 2009, H.R. 1315, would likewise grant exclusive jurisdiction over *habeas* challenges to the U.S. District Court in the District of Columbia and stay pending *habeas* cases.<sup>45</sup> However, in contrast to H.R. 630, it would stay *habeas* proceedings not to facilitate Military Commissions Act procedures but to await the outcome of status review hearings held by panels of military judges. In addition, the time period in which judges would render decisions in the status review process would be sharply limited—to 120 days from the legislation’s enactment for all detainees.

## Conclusion

Some bills introduced during the time frame of President Obama’s executive orders indicated initial support for closure of the detention facility. In contrast, restrictions on the use of federal funds in authorization and appropriations measures enacted to date in the 111<sup>th</sup> Congress arguably signal Congress’s present reluctance to facilitate closure of the detention facility, at least in the absence of significant congressional oversight. In particular, restrictions on the use of appropriated funds in multiple public laws appear to indicate opposition to the release and transfer of detainees into the United States. However, exceptions to the restrictions suggest congressional approval for transfers, particularly for the purpose of prosecution, which follow the presentation to Congress of risk assessments and other information.

Other changes effected by legislation enacted in the 111<sup>th</sup> Congress, such as new military commissions procedures, are likely to significantly impact the treatment and disposition of Guantanamo detainees. These and pending proposals are also likely to inform future legislative debates regarding the treatment and rights of detainees at Guantanamo and elsewhere.

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<sup>45</sup> Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111<sup>th</sup> Cong. (2009).